5.40 HARASSMENT AND HOSTILE ENVIRONMENT CASES

~~SEXUAL HARASSMENT~~ UNDER TITLE VII, 1981, 1983, ADA AND ADEA

~~OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED BY THE CIVIL RIGHTS ACT OF 1991~~

Introductory Comment

The following instructions are designed for use in ~~sexual~~ harassment cases ~~under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991~~. In *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986), the United States Supreme Court held that sexual harassment is "a form of sex discrimination prohibited by Title VII." The same can be said for the other forms of harassment. They are a form of discrimination and are actionable if they involve a hostile working environment. ~~More recently, the Supreme Court addressed the requirements of a sexual harassment claim, *see Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993), ruled that~~ *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), same-sex sexual harassment is actionable under Title VII~~, and clarified the standards governing an employer's liability in sexual harassment cases, *see Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)~~.

According to guidelines promulgated by the Equal Employment Opportunity Commission (EEOC), sexual harassment includes "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." 29 C.F.R. § 1604.11(a). Two theories of sexual harassment have been recognized by the courts--"quid pro quo" and "hostile work environment" harassment. Those cases in which the plaintiff claims that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands are generally referred to as "quid pro quo" cases, as distinguished from cases based on "bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment." *See Burlington Indus.*, 524 U.S. at 751. Harassment other than sexual will rarely, if ever, be of the quid pro quo type.

Although the Supreme Court has recently stated that the "quid pro quo" and "hostile work environment" labels are no longer controlling for purposes of establishing employer liability, the terms--to the extent they illustrate the distinction between cases involving a threat which is carried out and offensive conduct in general--are relevant when there is a threshold question whether a plaintiff can prove discrimination in violation of Title VII. *See Burlington Indus.*, 524 U.S. at ___, 118 S. Ct. at 2265; *accord Newton v. Cadwell Lab.*, 156 F.3d 880, 883 (8th Cir. 1998) (recognizing Supreme Court's statement that "quid pro quo" and "hostile work environment" labels are no longer controlling for purposes of establishing employer liability).

In *Faragher* and *Burlington Industries*, the Supreme Court held that employers are vicariously liable for the discriminatory actions of their supervisory personnel. *Faragher*, 524 U.S. at 777-78; *Burlington Indus.*, 524 U.S. at ___, 118 S. Ct. at 2261; *accord Rorie v. United Parcel Serv., Inc.*, 151 F.3d 757, 762 (8th Cir. 1998) (citing *Faragher* and *Burlington Industries*). It is not necessary that those at the highest executive levels receive actual notice before an employer is liable for ~~sexual~~ harassment. To establish liability, however, the Supreme Court differentiated between cases in which an employee suffers an adverse "tangible employment action" as a result of the supervisor's sexual harassment and those cases in which an employee does not suffer a tangible employment action, but suffers the intangible harm flowing from the indignity and humiliation of sexual harassment. *See Newton*, 156 F.3d at 883 (recognizing distinction between cases in which ~~sexual~~ harassment (or discrimination) results in a tangible employment action and cases in which no tangible employment action occurs).

When an employee suffers a tangible employment action resulting from a supervisor's ~~sexual~~ harassment (or discrimination), the employer's liability is established by proof of ~~sexual~~ harassment and the resulting adverse tangible employment action taken by the supervisor. *See Faragher*, 524 U.S. at ___, 118 S. Ct. at 2292-93; *Burlington Indus.*, 524 U.S. at ___, 118 S. Ct. at 2270. *See also Newton*, 156 F.3d at 883. No affirmative defense is available to the employer in those cases. *See Phillips v. Taco Bell Corp.*, 156 F.3d 884, 889 n.6 (8th Cir. 1998) (citing *Faragher*, 524 U.S. ___, 118 S. Ct. at 2293; *Burlington Indus.*, 524 U.S. at ___, 118 S. Ct. at 2270).

In cases where no tangible employment action has been taken by the supervisor, the defending employer may interpose an affirmative defense to defeat liability or damages. That affirmative defense "comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any ~~sexually~~ illegal harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Faragher*, 524 U.S. at 807; *Burlington Indus.*, 524 U.S. at ___, 118 S. Ct. at 2270. *See also Taco Bell*, 156 F.3d at 887-88 (quoting *Faragher* and *Burlington Industries*); *Rorie*, 151 F.3d at 762 (quoting same).

Whether an individual is a "supervisor" for purposes of analyzing vicarious liability under *Faragher* and *Burlington Industries* may be a contested issue. *Compare Whitmore v. O'Connor Management, Inc.*, 156 F.3d 796, 800 (8th Cir. 1998) (lead person was "demonstratively not a part of [defendant's] management") *with id.*, 156 F.3d at 801 (J. Gibson, J., dissenting) (lead person was defendant's "agent" for purposes of reporting complaints and deposition testimony showed that lead person had supervisory authority over plaintiff and alleged harasser).

In light of the new guidance from the Supreme Court, the Committee has drafted instructions for use in three types of cases: (1) those cases in which the plaintiff alleges that he or she suffered a tangible employment action resulting from a refusal to submit to a supervisor's sexual demands (Model Instruction 5.41, *infra*); (2) those cases in which the plaintiff did not suffer any tangible employment

action, but claims that he or she was subjected to ~~sexual~~ illegal harassment by a supervisor sufficiently severe or pervasive to create a hostile working environment (Model Instruction 5.42, *infra*); and (3) those cases in which the plaintiff did not suffer any tangible employment action, but claims that he or she was subjected to ~~sexual~~ illegal harassment by non-supervisors sufficiently severe or pervasive to create a hostile working environment (Model Instruction 5.43, *infra*).

5.41 ~~SEXUAL~~ HARASSMENT (By Supervisor With Tangible Employment Action) Essential Elements

Your verdict must be for plaintiff [and against defendant _____][1] on plaintiff's claim of sexual harassment if all of the following elements have been proved by the [(greater weight) (preponderance)][2] of the evidence:

First, plaintiff was subjected to (describe alleged conduct giving rise to plaintiff's claim)[3]; and

Second, such conduct was unwelcome[4]; and

Third, such conduct was based on plaintiff's [(sex) (gender)][5]; and

Fourth, defendant (specify action(s) taken with respect to plaintiff)[6]; and

Fifth, plaintiff's [(rejection of) (failure to submit to)][7] such conduct was a motivating factor[8] in the decision to (specify action(s) taken with respect to plaintiff).

If any of the above elements has not been proved by the [(greater weight) (preponderance)] of the evidence, your verdict must be for the defendant and you need not proceed further in considering this claim.[9]

Committee Comments

This instruction is designed primarily for use in sexual harassment cases where the plaintiff alleges that he or she suffered a tangible employment action resulting from a refusal to submit to a supervisor's sexual demands. When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms or conditions of employment that is actionable under Title VII. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, ___, 118 S. Ct. 2257, 2265 (1998). These cases (i.e., cases based on threats which are carried out) are "referred to often as quid pro quo cases, as distinct from bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment." *Id.* at 2264.

The "Unwelcome" Requirement

In sexual harassment cases, the offending conduct must be "unwelcome." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 68 (1986). In the Eighth Circuit, "conduct must be 'unwelcome' in the sense that the employee did not solicit or invite it, and the employee regarded the conduct as undesirable or offensive." *Moylan v. Maries County*, 792 F.2d 746, 749 (8th Cir. 1986); *see also Burns v. McGregor Elec. Indus., Inc. [Burns I]*, 955 F.2d 559, 565 (8th Cir. 1992). In the typical

quid pro quo case, where the plaintiff asserts a causal connection between a refusal to submit to sexual advances and a tangible employment action, the "unwelcome" requirement will be met if the jury finds that the plaintiff in fact refused to submit to a supervisor's sexual advances. However, if the court allows a plaintiff to pursue a quid pro quo claim despite his or her submission to the supervisor's sexual advances, the "unwelcome" element is likely to be disputed and must be included.

Conduct Based on Sex

In general, the plaintiff must establish that harassment was "based on sex" in order to prevail on a sexual harassment claim. *See, e.g., Burns v. McGregor Elec. Indus., Inc. [Burns II]*, 989 F.2d 959, 964 (8th Cir. 1993). Because quid pro quo harassment involves behavior that is sexual in nature, there typically will not be a dispute as to whether the objectionable behavior was based on sex. As the Eighth Circuit has stated, "sexual behavior directed at a woman raises the inference that the harassment is based on her sex." *Burns I*, 955 F.2d 559, 564 (8th Cir. 1992).

The Supreme Court has ruled that same-sex sexual harassment is actionable under Title VII. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S.75 (1998); *accord Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463 (8th Cir. 1996); *Quick v. Donaldson Co.*, 90 F.3d 1372 (8th Cir. 1996).

Employer Liability

As noted in the Introductory Comment, the Supreme Court has recently held that an employer is "vicariously liable" when its supervisor's discriminatory act results in a tangible employment action. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, ___, 118 S. Ct. 2257, 2269 (1998) ("A tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer."). No affirmative defense is available is such cases. *Id*. at 2270.

Tangible Employment Action

According to the Supreme Court, a "tangible employment action" for purposes of the vicarious liability issue means "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998) (citations omitted). In most cases, a tangible employment action "inflicts direct economic harm." *Id.* at 762.

Notes on Use

1. Use this phrase if there are multiple defendants.

2. Select the bracketed language that corresponds to the burden-of-proof instruction given.

3. The conduct or conditions forming the basis for the plaintiff's sexual harassment claim (e.g., requests for sexual relations by his or her supervisor) should be described here. Excessive detail is neither necessary nor desirable and may be interpreted by the appellate court as a comment on the evidence. *See Caviness v. Nucor-Yamato Steel Co.*, 105 F.3d 1216 (8th Cir. 1997). It is appropriate to focus the jury's attention on the essential or ultimate facts which plaintiff contends constitutes the conditions which make the environment hostile. Open-ended words such as "etc." should be avoided. Commenting on the evidence, for example, by telling the jury that certain evidence should be considered with caution, or suggesting the judge does believe or does not believe, or is skeptical about some evidence is inadvisable. A brief listing of the essential facts or circumstances which plaintiff must prove is not normally deemed to be a comment on the evidence. Placing undue emphasis on a particular theory of plaintiff's or defendant's case should also be avoided. *See Tyler v. Hot Springs Sch. Dist. No. 6*, 827 F.2d 1227, 1231 (8th Cir. 1987).

4. If the court wants to define this term, the following should be considered: "Conduct is 'unwelcome' if the plaintiff did not solicit or invite the conduct and regarded the conduct as undesirable or offensive." This definition is taken from *Moylan v. Maries County*, 792 F.2d 746, 749 (8th Cir. 1986).

5. ~~Because q~~Quid pro quo harassment usually involves conduct that is clearly sexual in nature~~, this element ordinarily may be omitted from the instruction~~. If it is based on something else, this sentence must be modified.

6. Insert the appropriate language depending on the nature of the case (*e.g.*, "discharged," "failed to hire," "failed to promote," or "demoted"). Where the plaintiff resigned but claims a "constructive discharge," this instruction should be modified. *See infra* Model Instruction 5.93.

7. This instruction is designed for use in sexual harassment cases where the plaintiff alleges that he or she suffered a tangible employment action resulting from a refusal to submit to a supervisor's sexual demands. If the plaintiff submitted to the supervisor's sexual advances, and the court allows the plaintiff to pursue such a claim under this instruction rather than requiring plaintiff to submit such a claim under Model Instruction 5.42, *infra*, this instruction must be modified or, alternatively, the trial court may use special interrogatories to build a record on all of the potentially dispositive issues. *See, e.g., Karibian v. Columbia University*, 14 F.3d 773, 778 (2d Cir.), *cert. denied*, 512 U.S. 1213 (1994).

8. The Committee recommends that the definition of "motivating factor" set forth in Model Instruction 5.96, *infra*, be given.

9. Because this instruction is designed for use in cases in which tangible employment action has been taken, plaintiff's claim may be analyzed under the "motivating factor/same decision" format used in other Title VII cases. *See infra* Model Instruction 5.01A. For damages instructions and a verdict form, Model Instructions 5.02 through 5.05, *infra*, may be used.

5.42 ~~SEXUAL~~ HARASSMENT (By Supervisor With No Tangible Employment Action) Essential Elements

Your verdict must be for plaintiff [and against defendant _____][1] on plaintiff's claim of [sexual/gender] [racial] [color] [national origin] [religious] [age] [disability] harassment if all of the following elements have been proved by the [(greater weight) (preponderance)][2] of the evidence:

First, plaintiff was subjected to (describe alleged conduct or conditions giving rise to plaintiff's claim)[3]; and

Second, such conduct was unwelcome[4]; and

Third, such conduct was based on plaintiff's [(sex/gender) (race) (color) (national origin) (religion) (age) (disability) ~~(gender)~~][5]; and

Fourth, such conduct was sufficiently severe or pervasive that a reasonable person in plaintiff's position would find plaintiff's work environment to be [(hostile) (abusive)][6]; and

Fifth, at the time such conduct occurred and as a result of such conduct, plaintiff believed [(his) (her)] work environment to be [(hostile) (abusive)].

If any of the above elements has not been proved by the [(greater weight) (preponderance)] of the evidence, [or if defendant is entitled to a verdict under Instruction ____,][7] your verdict must be for the defendant and you need not proceed further in considering this claim.

Committee Comments

This instruction is designed for use in ~~sexual~~ harassment cases where the plaintiff did not suffer any "tangible" employment action such as discharge or demotion, but rather suffered "intangible" harm flowing from a supervisor's ~~sexual~~ harassment that is "sufficiently severe or pervasive to create a hostile work environment." *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742,751 (1998).

It is impossible to compile an exhaustive list of the types of conduct that may give rise to a hostile environment ~~sexual~~ harassment claim under Title VII and other statutes. Some examples of this kind of conduct include: verbal abuse of a sexual, racial or religious nature; graphic verbal commentaries about an individual's body, sexual prowess, or sexual deficiencies; or age; sexually degrading or vulgar words to describe an individual; pinching, groping, and fondling; suggestive, insulting, or obscene comments or gestures; the display in the workplace of sexually suggestive objects, pictures, posters or cartoons; asking questions about sexual conduct; and unwelcome sexual advances. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Meritor Savings Bank v. Vinson*, 477 U.S.

57 (1986); *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316 (8th Cir. 1994); *Hukkanen v. International Union of Operating Eng'rs Local No. 101*, 3 F.3d 281 (8th Cir. 1993); *Burns v. McGregor Elec. Indus., Inc. [Burns II]*, 989 F.2d 959 (8th Cir. 1993); *Burns v. McGregor Elec. Indus., Inc. [Burns I]*, 955 F.2d 559 (8th Cir. 1992); *Jones v. Wesco Invs., Inc.*, 846 F.2d 1154 (8th Cir. 1988); *Hall v. Gus Constr. Co.*, 842 F.2d 1010 (8th Cir. 1988).

Conduct Based on Sex or Gender

In general, the plaintiff must establish that the alleged offensive conduct was "based on sex." *Burns II*, 989 F.2d at 964. Despite its apparent simplicity, this requirement raises a host of interesting issues. For example, in an historically male-dominated work environment, it may be commonplace to have sexually suggestive calendars on display and provocative banter among the male employees. While the continuation of this conduct may not be directed at a new female employee, it nevertheless may be actionable on the theory that sexual behavior at work raises an inference of discrimination against women. *See Burns I*, 955 F.2d at 564; *see also Stacks v. Southwestern Bell*, 27 F.3d 1316 (8th Cir. 1994) (sexual conduct directed by male employees toward women other than the plaintiff was considered part of a hostile work environment).

The Eighth Circuit also has indicated that conduct which is not sexual in nature but is directed at a woman because of her gender can form the basis of a hostile environment claim. *See, e.g., Gillming v. Simmons Indus.*, 91 F.3d 1168, 1171 (8th Cir. 1996) (jury instruction need not require a finding that acts were explicitly sexual in nature); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988) (calling a female employee "herpes" and urinating in her gas tank, although not conduct of an explicit sexual nature, was properly considered in determining if a hostile work environment existed); *see also Stacks*, 27 F.3d at 1326 (differential treatment based on gender in connection with disciplinary action supported a female employee's hostile work environment claim); *Shope v. Board of Sup'rs*, 14 F.3d 596 (table), 1993 WL 525598 (4th Cir. Dec. 20, 1993) (rude, disparaging, and "almost physically abusive" conduct based on gender supported a hostile environment claim).

The Eighth Circuit has not directly addressed the issue of whether vulgar or abusive conduct that is directed equally toward men and women can constitute a violation of Title VII. Because sexual harassment is a variety of sex discrimination, some courts have suggested that it is not a violation of Title VII if a manager is equally abusive to male and female employees. For example, in *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987), *abrogated on other grounds*, 510 U.S. 178 (1993), the court suggested that sexual harassment of all employees by a bisexual supervisor would not violate Title VII. In a similar vein, the district court in *Kopp v. Samaritan Health System, Inc.*, 13 F.3d 264 (8th Cir. 1993), granted the employer's motion for summary judgment on the theory that the offending supervisor was abusive toward all employees. Although the Eighth Circuit reversed because the plaintiff had offered evidence that the abuse directed toward female employees was more frequent and more severe than the abuse directed at male employees, *Kopp* suggests that the "equal opportunity harassment" defense can present a question of

fact for the jury. *But see Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334 (D. Wyo. 1993) (holding that "equal opportunity harassment" of employees of both genders can violate Title VII).

The Supreme Court has ruled that same-sex sexual harassment is actionable under Title VII. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998); *accord Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463 (8th Cir. 1996); *Quick v. Donaldson Co.*, 90 F.3d 1372 (8th Cir. 1996).

Hostile or Abusive Environment

In order for hostile environment harassment to be actionable, it must be "so 'severe or pervasive' as to 'alter the conditions of [the victim's] employment and create an abusive working environment.'" *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998) (quoting *Meritor Savings Bank v. Vinson*, 477 U.S. at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982))); *accord Parton v. GTE North, Inc.*, 971 F.2d 150, 154 (8th Cir. 1992); *Burns v. McGregor Elec. Indus., Inc. [Burns I]*, 955 F.2d 559, 564 (8th Cir. 1992); *Staton v. Maries County*, 868 F.2d 996, 998 (8th Cir. 1989); *Minteer v. Auger*, 844 F.2d 569 (8th Cir. 1988). In *Moylan v. Maries County*, 792 F.2d 746 (8th Cir. 1986), the court explained:

> The harassment must be "sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment." *Henson v. City of Dundee*, 682 F.2d at 904. The plaintiff must show a practice or pattern of harassment against her or him; a single incident or isolated incidents generally will not be sufficient. The plaintiff must generally show that the harassment is sustained and non trivial.

Id. at 749-50; *see Faragher*, 524 U.S. at 788 ("'[S]imple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'") (citations omitted).

"[I]n assessing the hostility of an environment, a court must look to the totality of the circumstances." *Stacks*, 27 F.3d at 1327 (citation omitted). In *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993), the Court held that a hostile environment claim may be actionable without a showing that the plaintiff suffered psychological injury. In determining whether an environment is hostile or abusive, the relevant factors include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. *Harris*, 510 U.S. at 23. *See also Faragher*, 524 U.S. at ___, 118 S. Ct. at 2283 (reiterating relevant factors set forth in *Harris*); *accord Phillips v. Taco Bell Corp.*, 156 F.3d 884, 889 (8th Cir. 1998) (citing *Harris*).

Objective and Subjective Requirement

In *Harris*, the Supreme Court explained that "a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." *Faragher*, 524 U.S. at 787 (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993) ("[I]f the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.")); *accord Rorie v. United Parcel Serv., Inc.*, 151 F.3d 757, 761 (8th Cir. 1998).

Employer Liability

As noted in the Introductory Comment, the Supreme Court has recently held that an employer is "subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). Unlike those cases in which the plaintiff suffers a tangible employment action, however, in cases where no tangible employment action has been taken by the supervisor, the employer may raise an affirmative defense to liability or damages. *Id*. *See infra* Model Instruction 5.42(A) & Committee Comments.

Notes on Use

1. Use this phrase if there are multiple defendants.

2. Select the bracketed language that corresponds to the burden-of-proof instruction given.

3. The conduct or conditions forming the basis for the plaintiff's ~~sexual~~ harassment claim should be described here. Excessive detail is neither necessary nor desirable and may be interpreted by the appellate court as a comment on the evidence. *See Caviness v. Nucor-Yamato Steel Co.*, 105 F.3d 1216 (8th Cir. 1997). It is appropriate to focus the jury's attention on the essential or ultimate facts which plaintiff contends constitutes the conditions which make the environment hostile. Open-ended words such as "etc." should be avoided. Commenting on the evidence, for example, by telling the jury that certain evidence should be considered with caution, or suggesting the judge does believe or does not believe, or is skeptical about some evidence is inadvisable. A brief listing of the essential facts or circumstances which plaintiff must prove is not normally deemed to be a comment on the evidence. Placing undue emphasis on a particular theory of plaintiff's or defendant's case should also be avoided. *See Tyler v. Hot Springs Sch. Dist. No. 6*, 827 F.2d 1227, 1231 (8th Cir. 1987).

4. The term "unwelcome" may be of such common usage that it need not be defined. If the court wants to define this term, the following should be considered: "Conduct is 'unwelcome' if the

plaintiff did not solicit or invite the conduct and regarded the conduct as undesirable or offensive." This definition is taken from *Moylan v. Maries County*, 792 F.2d 746, 749 (8th Cir. 1986).

5. As noted in the Committee Comments, there are a number of subsidiary issues which can arise in connection with the requirement that actionable harassment must be "based on sex" or other prohibited category. If the allegedly offensive conduct clearly was directed at the plaintiff because of his or her gender, age or race, it is not necessary to include this element. However, if there is a dispute as to whether the offensive conduct was discriminatory--for example, if the offending conduct may have been equally abusive to both men and women or if men and women participated equally in creating a "raunchy workplace"--it may be necessary to modify this element to properly frame the issue.

6. Select the word which best describes plaintiff's theory. Both words may be appropriate. This element sets forth the "objective test" for a hostile work environment. As discussed in the Committee Comments, it is the Committee's position that the appropriate perspective is that of a "reasonable person." In addition, it may be appropriate to include the factors set forth in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993), and reiterated in *Faragher v. City of Boca Raton*, 524 U.S. 775, ___, 118 S. Ct. 2275, 2283 (1998), to aid in determining whether a plaintiff's work environment was hostile or abusive. For example:

> In determining whether a reasonable person in the plaintiff's circumstances would find the plaintiff's work environment to be hostile or abusive, you must look at all the circumstances. The circumstances may include the frequency of the conduct complained of; its severity; whether it was physically threatening or humiliating, or merely offensive; whether it unreasonably interfered with the plaintiff's work performance; and the effect on plaintiff's psychological well-being. No single factor is required in order to find a work environment hostile or abusive.

7. Because this instruction is designed for cases in which no tangible employment action is taken, the defendant may defend against liability or damages by proving an affirmative defense "of reasonable oversight and of the employee's unreasonable failure to take advantage of corrective opportunities." *Nichols v. American Nat'l Ins. Co.*, 154 F.3d 875, 887 (8th Cir. 1998) (citing *Faragher*, 524 U.S. at 807; *Burlington Indus.*, 524 U.S. at ___, 118 S. Ct. at 2270). The bracketed language should be used when the defendant is submitting the affirmative defense. *See infra* Model Instruction 5.42(A).

5.42(A) AFFIRMATIVE DEFENSE
(For Use in Cases With No Tangible Employment Action)

Your verdict must be for defendant on plaintiff's claim of ~~sexual~~ harassment if it has been proved by the [greater weight) (preponderance)][1] of the evidence that (a) defendant exercised reasonable care to prevent and correct promptly any ~~sexually~~ harassing behavior; and (b) that plaintiff unreasonably failed to take advantage of (specify the preventive or corrective opportunities provided by defendant of which plaintiff allegedly failed to take advantage or how plaintiff allegedly failed to avoid harm otherwise).[2]

Committee Comments

Recently, the United States Supreme Court held that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by [the employee's] supervisor." *Rorie v. United Parcel Serv., Inc.*, 151 F.3d 757, 762 (8th Cir. 1998) (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 745 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 777 (1998)). When "no tangible employment action, such as discharge, demotion, or undesirable reassignment" is taken, however, an employer may defend against liability or damages "by proving an affirmative defense of reasonable oversight and of the employee's unreasonable failure to take advantage of corrective opportunities." *Nichols v. American Nat'l Ins. Co.*, 154 F.3d 875, 887 (8th Cir. 1998) (citing *Faragher*, 524 U.S. at 807; *Burlington Indus.*, 524 U.S. at ___, 118 S. Ct. at 2270)); *accord Phillips v. Taco Bell Corp.*, 156 F.3d 884, 888 (8th Cir. 1998) (citing same); *Newton v. Cadwell Laboratories*, 156 F.3d 880, 883 (8th Cir. 1998) (citing same). The language of the affirmative defense is taken verbatim from the Supreme Court's decisions in *Burlington Industries* and *Faragher*.

Notes on Use

1. Select the bracketed language that corresponds to the burden-of-proof instruction given.

2. According to the Supreme Court, a defendant asserting this affirmative defense must prove not only that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, but also that "plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by defendant or to avoid harm otherwise." *Faragher*, 524 U.S. at 807; *Burlington Indus.*, 524 U.S. at ___, 118 S. Ct. at 2270. For purposes of instructing the jury, however, the Committee recommends that the specific preventive or corrective opportunities of which plaintiff allegedly failed to take advantage or the particular manner in which plaintiff allegedly failed to avoid harm be identified.

5.43 ~~SEXUAL~~ HARASSMENT (By Nonsupervisor With No Tangible Employment Action) Essential Elements

Your verdict must be for plaintiff [and against defendant _____][1] on plaintiff's claim of [sexual/gender] [racial] [color] [national origin] [religious] [age] [disability] harassment if all of the following elements have been proved by the [(greater weight) (preponderance)][2] of the evidence:

First, plaintiff was subjected to (describe alleged conduct or conditions giving rise to plaintiff's claim)[3]; and

Second, such conduct was unwelcome[4]; and

Third, such conduct was based on plaintiff's [(~~sex~~) (/gender) (race) (color) (national origin) (religion) (age) (disability)][5]; and

Fourth, such conduct was sufficiently severe or pervasive that a reasonable person in plaintiff's position would find plaintiff's work environment to be [(hostile) (abusive)][6]; and

Fifth, at the time such conduct occurred and as a result of such conduct, plaintiff believed [(his) (her)] work environment to be [(hostile) (abusive)]; and

Sixth, defendant knew or should have known of the (describe alleged conduct or conditions giving rise to plaintiff's claim)[7]; and

Seventh, defendant failed to take prompt and appropriate corrective action to end the harassment.[8]

If any of the above elements has not been proved by the [(greater weight) (preponderance)] of the evidence, your verdict must be for the defendant and you need not proceed further in considering this claim.[9]

Committee Comments

This instruction is designed for use in cases where the plaintiff did not suffer any tangible employment action, but claims that he or she was subjected to sexual harassment by non-supervisors (as opposed to supervisory personnel) sufficiently severe or pervasive to create a hostile working environment. In such cases (*i.e.*, cases not involving vicarious liability), "[e]mployees have some obligation to inform their employers, either directly or otherwise, of behavior that they find objectionable before employer can be held responsible for failing to correct that behavior, at least

ordinarily." *Whitmore v. O'Connor Management, Inc.*, 156 F.3d 796, 800 (8th Cir. 1998) (decided after the Supreme Court's opinions in *Burlington Industries* and *Faragher*).

Notes on Use

1. Use this phrase if there are multiple defendants.

2. Select the bracketed language that corresponds to the burden-of-proof instruction given.

3. The conduct or conditions forming the basis for the plaintiff's ~~sexual~~ harassment claim should be described here. Excessive detail is neither necessary nor desirable and may be interpreted by the appellate court as a comment on the evidence. *See Caviness v. Nucor-Yamato Steel Co.*, 105 F.3d 1216, 1222 (8th Cir. 1997). It is appropriate to focus the jury's attention on the essential or ultimate facts which plaintiff contends constitutes the conditions which make the environment hostile. Open-ended words such as "etc." should be avoided. Commenting on the evidence, for example, by telling the jury that certain evidence should be considered with caution, or suggesting the judge does believe or does not believe, or is skeptical about some evidence is inadvisable. A brief listing of the essential facts or circumstances which plaintiff must prove is not normally deemed to be a comment on the evidence. Placing undue emphasis on a particular theory of plaintiff's or defendant's case should also be avoided. *See Tyler v. Hot Springs Sch. Dist. No. 6*, 827 F.2d 1227, 1231 (8th Cir. 1987).

4. The term "unwelcome" may be of such common usage that it need not be defined. If the court wants to define this term, the following should be considered: "[Conduct is 'unwelcome'] if the employee did not solicit or invite it and the employee regarded the conduct as undesirable or offensive." This definition is taken from *Moylan v. Maries County*, 792 F.2d 746, 749 (8th Cir. 1986).

5. As noted in the Committee Comments, there are a number of subsidiary issues which can arise in connection with the requirement that actionable harassment must be "based on sex" or other prohibited category. If the allegedly offensive conduct clearly was directed at the plaintiff because of his or her gender, age or race, it is not necessary to include this element. However, if there is a dispute as to whether the offensive conduct was discriminatory--for example, if the offending conduct may have been equally abusive to both men and women or if men and women participated equally in creating a "raunchy workplace"--it may be necessary to modify this element to properly frame the issue.

6. Select the word which best describes plaintiff's theory. Both words may be appropriate. This element sets forth the "objective test" for a hostile work environment. As discussed in the Committee Comments, it is the Committee's position that the appropriate perspective is that of a "reasonable person." In addition, it may be appropriate to include the factors set forth in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993), and reiterated in *Faragher v. City of Boca Raton*, 524 U.S. 775, ___, 118 S. Ct. 2275, 2283 (1998), to aid in determining whether a plaintiff's work environment was hostile or abusive. For example:

In determining whether a reasonable person in the plaintiff's circumstances would find the plaintiff's work environment to be hostile or abusive, you must look at all the circumstances. The circumstances may include the frequency of the conduct complained of; its severity; whether it was physically threatening or humiliating, or merely offensive; whether it unreasonably interfered with the plaintiff's work performance; and the effect on plaintiff's psychological well-being. No single factor is required in order to find a work environment hostile or abusive.

7. As noted in the Committee Comments, there are generally two requirements for establishing employer liability in sexual harassment cases where the plaintiff claims harassment by his or her coworkers rather than by supervisory personnel: (1) the plaintiff must show that the employer knew or should have known of the harassment; and (2) the plaintiff must show that the employer failed to take appropriate action to end the harassment. This element sets forth the first half of the test. As a practical matter, it is unlikely that the defendant will seriously contest both issues: if the employer claims it never knew of the harassment, the question of whether its response was appropriate would be moot; conversely, if the employer's primary defense is that it took appropriate remedial action, the "knew or should have known" element may be moot.

8. As discussed in the Introductory Comment, the Supreme Court's recent opinions with respect to employer liability in sexual harassment cases address only those situations in which a supervisor (as opposed to a non-supervisor) sexually harasses a subordinate. In cases in which the plaintiff alleges sexual harassment by a non-supervisor, the issue of whether courts will leave the burden on plaintiff to prove that the defendant failed to take prompt and appropriate corrective action or whether courts will place the burden on the defendant to prove an affirmative defense that it took prompt and appropriate corrective action as in *Faragher* and *Burlington Industries* is an open question. *See, e.g., Coates v. Sundor Brands, Inc.*, 164 F.3d 1361, 1366 (11th Cir. 1999) (Barkett, concurring).

9. Because this instruction is designed for use in cases in which no tangible employment action has been taken, plaintiff's claim should not be analyzed under the "motivating factor/same decision" format used in other Title VII cases. *See Stacks v. Southwestern Bell*, 27 F.3d 1316 (8th Cir. 1994). For damages instructions and a verdict form, Model Instructions 5.02 through 5.05, *infra*, should be used in a modified format. For a sample constructive discharge instruction, *see infra* Model Instruction 5.93.